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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 557

JUDSON L. THOMSON MANUFACTURING COMPANY,
PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the circuit court of appeals (R. 1113) is reported in 150 F. 2d 952.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 31, 1945 (R. 1125). The petition for a writ of certiorari was filed on October 23, 1945. The jurisdiction of this Court is invoked under Section 11 of the Clayton Act, 38 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the leasing of rivet-setting machines on the condition that the lessees shall use in the leased machines only rivets supplied by the lessor, but without any condition or agreement barring the lessees from buying or leasing like rivet-setting machines from other manufacturers, constitutes the leasing of machinery on the condition that the lessee shall not "use" the goods or supplies of competitors of the lessor, within the meaning of Section 3 of the Clayton Act.

STATUTE INVOLVED

Section 3 of the Clayton Act, 38 Stat. 731, 15 U. S. C. 14 provides:

> It shall be unlawful for any person engaged in commerce,[1] in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee

[1] Section 1 of the Clayton Act, 15 U. S. C. 12, defines the word "commerce" as used in the Act as meaning interstate or foreign commerce.

> or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

STATEMENT

The Federal Trade Commission, after issuing a complaint which charged petitioner with violating Section 3 of the Clayton Act and after taking testimony, made detailed findings of fact (R. 32–41), of which the following are pertinent:

Petitioner manufactures and sells tubular and bifurcated rivets and also manufactures automatic rivet-setting machines which it leases but does not sell (R. 33, 38). The machines are leased to and used by manufacturers in the industrial field (R. 34) and each of petitioner's leases provides (R. 39): "The licensee shall not use or allow said leased machinery to be used for setting any other rivets than those made and sold by the company."

The principal other manufacturer of automatic rivet-setting machines likewise leases, but does not sell, its machines (R. 35–36). There are also six other manufacturers of such machines who both lease and sell them (R. 36–37). The machines are sold at prices ranging from $150 to

$1,000 or more (R. 38). Their leases contain a similar condition to that here (R. 35).

Petitioner leases its ordinary types of machines for a yearly rental of from $15 to $25. The rental is rebated if the lessee uses a stated quantity of rivets, and petitioner services its machines and replaces parts (with one exception) without charge. On the other hand, petitioner charges about 10% more for its rivets than the prices at which corresponding rivets can be purchased on the open market. (R. 38.) Petitioner's primary purpose in leasing its machines is to provide a sales outlet for its rivets, and the rental received from its machines is not sufficient to warrant leasing them in the absence of petitioner's sale of rivets to the lessees (R. 39).

There is an ample supply on the market of tubular and bifurcated rivets available for use in petitioner's machines, and the restrictive condition in petitioner's leases prevents other manufacturers of rivets from selling them to petitioner's lessees. The effect of the restrictive condition is and may be to substantially lessen competition in the sale of tubular and bifurcated rivets. (R. 41.)

The Commission concluded that petitioner's practices were in violation of Section 3 of the Clayton Act and it entered an order requiring the petitioner to cease and desist from leasing its rivet-setting machines on the condition, agreement or understanding that the lessee shall use in such

machines exclusively petitioner's rivets (R. 41–43). The court below, on review of the order, upheld its validity and entered a decree of enforcement (R. 1113–1125).

ARGUMENT

Section 3 of the Clayton Act makes it unlawful to lease goods on the condition that the lessee shall not "use or deal in" the goods of a competitor of the lessor. Petitioner's contention is that the Section makes unlawful a condition prohibiting all use of the goods of a competitor, and not a condition imposing only a limited prohibition on use of the goods of a competitor, such as prohibition of use of goods of competitors in machines leased from the lessor.

Consideration of the evils against which Section 3 is aimed, as disclosed by its legislative history, strongly indicates that the interpretation advanced by petitioner is erroneous. Both the House and Senate committees dealing with this legislation referred to the use of a "tying" contract as an "unfair trade practice" generally regarded as "injurious" and "monopolistic in its effects".[2] The minority report of the House com-

[2] H. Rep. No. 627, 63d Cong., 2d sess., p. 11; S. Rep. No. 698, 63d Cong., 2d sess., p. 6. A requirement that a lessee or purchaser use in or with a leased or purchased machine or device exclusively goods or supplies furnished by the lessor or purchaser is probably the commonest form of a so-called "tying" clause or contract.

mittee specifically complained of the fact that Section 3 would make it unlawful for an owner to lease a machine on the condition that the lessee should not use in it supplies not manufactured or sold by the lessor.[3]

Tying clauses which do not prohibit all use of the goods of a competitor have been held by this Court to be invalid under Section 3 of the Clayton Act. In *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451, 456–457, the Court affirmed a decree enjoining utilization of various restrictive clauses which the appellant had incorporated in the leases of its machines although none of the enjoined restrictive clauses prohibited all use of the products of a competitor. The Court said (p. 457) that it entertained no doubt that the provisions of the leases enjoined by the district court "are embraced in the broad terms of" Section 3 of the Clayton Act.

In *International Business Machines Corp.* v. *United States,* 298 U. S. 131, which was also a suit to enforce Section 3, the appellant leased its tabulating machines upon the condition that the lease should terminate in case any cards not manufactured by the lessor be used in the leased machine. This Court, in holding that there had been a violation of the Section, specifically dealt with the problem here presented. It said (p. 135):

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[3] H. Rep. 627, 63d Cong., 2d sess., Pt. 2, p. 5.

> It is true that the condition is not in so many words against the use of the cards of a competitor, but is affirmative in form, that the lessee shall use only appellant's cards in the leased machines. But as the lessee can make no use of the cards except with the leased machines, and the specified use of appellant's cards precludes the use of the cards of any competitor, the condition operates in the manner forbidden by the statute.

The Circuit Court of Appeals for the Fourth Circuit has held that Section 3 was violated upon facts almost precisely paralleling those of the instant case. *Signode Steel Strapping Co.* v. *Federal Trade Commission,* 132 F. 2d 48.

Petitioner attempts to distinguish the *Shoe Machinery* and *International Business Machines* cases upon the ground that in those cases the restrictive conditions had the "practical effect" of prohibiting all use of the products of a competitor. In the latter case, at least, the Court did not place its decision upon any such ground. Furthermore, the leases made by International Business Machines did not have the practical effect of barring all use of goods of a competitor since another company, which did about 19% of the total business, manufactured and leased like computing and tabulating machines (298 U. S. 131, 133, 136).

Petitioners contend, however, that the facts of the instant case more nearly square with those in *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463. That case held that the practice of various oil companies in leasing underground tanks with pumps to retail gasoline dealers upon the condition that the equipment be used only with gasoline supplied by the lessor, did not violate Section 3 of the Clayton Act. In the *International Business Machines* case, the Court explained this holding as follows (298 U. S. 131, 135):

> As the only use made of the gasoline was to sell it, and as there was no restraint upon the purchase and sale of competing gasoline, there was no violation of the Clayton Act.

CONCLUSION

While the Federal Trade Commission believes that the *Sinclair* case has been interpreted by this Court as resting on its particular facts and that the decision of the court below in the present case is clearly right, the Commission is also of the opinion that review by this Court would further clarify the meaning of Section 3 of the Clayton Act and would aid the Commission in its administration of that Section.[4] The Commission there-

[4] Determination by this Court of the issue presented here would serve as a guide to the Commission in a number of pending administrative proceedings which may or may not eventuate in the issuance of formal complaints.

fore does not oppose the granting of a petition for a writ of certiorari.

Respectfully submitted.

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